**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Leased Commercial Access | ) | MB Docket No. 07-42 |
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To: The Commission

# REPLY COMMENTS OF HOME SHOPPING NETWORK, INC.

Mace J. Rosenstein
Robert A. Long, Jr.
Brandon D. Almond

COVINGTON & BURLING LLP
1201 Pennsylvania Avenue NW
Washington, D.C. 20004-2401
202-662-6000

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## REPLY COMMENTS OF HOME SHOPPING NETWORK, INC.

Home Shopping Network, Inc. ("HSN"),[1] by its attorneys, hereby submits these reply comments in the captioned proceeding.

## INTRODUCTION AND SUMMARY

Despite the concerns of the Commission and some commenters that lower leased access rates for direct sales programmers will cause a migration of such programmers to leased access, the record shows that no material migration has occurred nor is likely to do so. The number of direct sales programmers that could migrate is small, and these programmers enjoy substantial benefits through their negotiated carriage agreements. Even if migration were to occur, the impact on cable systems – with their ever-growing capacity – would be immaterial.

Moreover, any attempt to restrict direct sales programmers' access to leased access channels would constitute prohibited content-based discrimination under the First Amendment. The Commission cannot show a compelling government interest because its concern about migration is purely speculative. Nor is the Commission's proposed differential

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[1] HSN is a subsidiary of IAC/InterActiveCorp. For convenience, HSN and its subsidiaries are referred to collectively herein as "HSN."

leased access rate narrowly tailored because it excludes all direct sales programmers regardless of their ability to afford carriage or offer diverse programming options.

Finally, commenters' arguments that direct sales programming does not serve the public interest ignore the pervasive evidence in the record establishing the numerous benefits direct sales programmers provide. Any attempt to restrict these programmers' ability to serve the public would be unfounded and unlawful.

## I. The New Leased Access Rate Will Not Cause Material Migration of Direct Sales Programmers.

Some commenters echo the Commisson's stated concern that extending the new, lower rates to direct sales programmers would cause a migration of these programmers to leased access. But the record establishes that harmful migration would not occur.

First, the number of direct sales programmers that could migrate to leased access is small.[2] Furthermore, there is no evidence that a lower leased access rate would cause any – much less all – of this small number of programmers to migrate to leased access because this would entail abandoning the benefits they are able to obtain through their negotiated carriage arrangements, such as favorable channel positions, long-term guarantees, joint marketing arrangements, and higher sales revenues.[3] In addition, cable systems continue to grow, thereby

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[2] *See* Comments of Shop NBC, Inc., In the Matter of Leased Commercial Access, MB Docket 07-42 (March 31, 2008) at 23 (noting that only three direct sales networks have wide distribution on cable systems and pointing out that the total number of full-time direct sales programmers on a particular cable system pursuant to negotiated carriage agreements is rarely more than three) ("Shop NBC Comments"). *But see* note 20, *infra* and accompanying text (noting the broad array of diverse direct sales programming currently available on both full- and part-time bases).

[3] *See, e.g., id.* at 24 (noting that its average net sales per subscriber are currently over 15 percent higher for viewers watching on systems where it has a carriage agreement as opposed to those systems where it relies on leased access).

expanding their capacity for both leased access and negotiated carriage channels.[4] For example, as cable systems implement digital technology, their aggregate bandwidth will increase – and, with it, the capacity for leased access programming.[5] Commenters' purported concern about migration ignores both market realities and the continuing expansion of cable system capacity.[6]

Even NCTA and others raising the spectre of migration acknowledge that there have been "very few instances of existing shopping channels migrating from negotiated carriage arrangements to leased access,"[7] and offer no empirical basis for their alarmist contention to the contrary. Indeed, the admission by NCTA's expert, Larry Gerbrandt, that direct sales programmers obtain quantifiable "benefits and efficiencies" when they negotiate for carriage that would be unavailable on leased access flies in the face of his unsubstantiated and speculative opinion that "virtually all" direct sales programmers would forgo these favorable negotiated arrangements in order to migrate to leased access.[8]

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[4] *See* Comments of Leased Access Programmers Association ("LAPA"), In the Matter of Leased Commercial Access, MB Docket 07-42, at 2-3 (March 31, 2008) (noting that cable operators will not need to rearrange current programming to accommodate new leased access users given their "hundreds of channels" of capacity) ("LAPA Comments"); Comments of Home Shopping Network, Inc., In the Matter of Leased Commercial Access, MB Docket 07-42, at 14-15 (March 31, 2008) (noting the increased capacity of cable systems that will accompany the digital transition) ("HSN Comments").

[5] *See* 47 U.S.C. 532(b)(1)(A)-(D) (providing, e.g., that a cable system with over 100 channels must devote 15 percent of its system to leased access). Thus, if a system's channel capacity doubles, so too will its corresponding leased access capacity because the statutory set aside remains a constant percentage.

[6] *See also* Comments of Media Access Project ("MAP"), In the Matter of Leased Commercial Access, MB Docket 07-42, at 3 (March 31, 2008) (arguing that market forces may limit the number of direct sales programmers seeking to lease channels) ("MAP Comments").

[7] Comments of the National Cable & Telecommunications Association, In the Matter of Leased Commercial Access, MB Docket 07-42 (March 31, 2008), at Attachment A, ¶ 17 ("NCTA Comments").

[8] *Id.* at Attachment A, ¶ 13. *Cf.* Shop NBC Comments at 25 ("The record in this proceeding lacks any evidence that migration has either been a major issue since leased access became an (continued...)

Equally speculative is NCTA's prediction that a uniform leased access rate formula would cost cable operators $259 million in revenues from lost carriage arrangements with direct sales programmers. NCTA's methodology relies on two fundamentally flawed assumptions: *first*, that all direct sales programmers will migrate to leased access (notwithstanding the acknowledged benefits of negotiated carriage); and, *second*, that any basic tier or other channels vacated by migrating direct sales programmers would remain fallow (evidently based on the further assumption that cable operators would decline to enter into valuable carriage arrangements with replacement program services). Even accepting NCTA's sleight-of-hand, the $259 million predicted lost revenue figure would represent only *0.003 percent* of NCTA's own estimated *$82 billion* annual residential cable revenue for 2008.[9] Speculative allegations of immaterial harm are an impermissible justification for any regulatory scheme – especially one that is discriminatory and constitutionally infirm.

Similarly, there is no justification for the arbitrary limitations proposed by MAP and Combonate Media Group. MAP does not oppose a unified leased rate structure but believes the Commission should limit the channels available to direct sales programmers to 33 percent of leased access capacity and reserve the right to adjust their rates in response to excessive migration.[10] For its part, Combonate would have the Commission apply a differential leased access rate on the basis of a purported distinction between direct sales programming that is "local" in nature (which apparently would be entitled to a lower rate) and "national" direct sales

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option for cable programmers or that migration by home shopping networks would have a materially adverse impact on cable operators' finances.").

[9] *See* http://www.ncta.com/Statistic/Statistic/RevenuefromCustomers.aspx.

[10] *See* MAP Comments at 4.

programming (which would not).[11] But MAP itself acknowledges that "the record does not suggest that independent programmers seeking to lease channels will be turned away because the capacity has been exhausted."[12] And the contention that nationally targeted direct sales programmers would occupy capacity to the exclusion of local programmers is entirely speculative.[13] Above all else, *any* proposal to limit or treat differently direct sales programming on the basis of its content raises significant First Amendment concerns.[14]

## II. The First Amendment Prohibits Differential Treatment of Programmers.

As both HSN and Shop NBC demonstrated in their comments, the First Amendment bars the Commission from establishing a differential leased access rate scheme that discriminates against direct sales programmers on the basis of the content of their programming.[15] The Commission's proposal is paradigmatic content-based discrimination, expressly singling out "programmers that predominantly transmit sales presentations or program length commercials." Direct sales programmers' speech "is defined by its content" and thus the

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[11] Comments of Combonate Media Group, In the Matter of Leased Commercial Access, MB Docket 07-42, at 3 (March 31, 2008) ("Combonate Comments").

[12] MAP Comments at 3.

[13] Furthermore, Combonate fails to address the important issue of who would make such a distinction, and how it would be made. A single direct sales programmer may offer multiple services benefiting both national and local communities – for instance, HSN sells Plant City, Florida strawberries nationwide.

[14] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (noting that, where "regulations . . . suppress, disadvantage, or impose *differential burdens* upon speech because of its content," a court must still "apply the most exacting scrutiny").

[15] HSN Comments at 15-20; Shop NBC Comments at 5-13.

Commission's proposal is subject to strict scrutiny because it "single[s] out particular programming content for regulation."[16]

Under the strict scrutiny standard, the Commission cannot show that content-based discrimination is necessary to serve a compelling government interest because its concern about migration – which the record shows has never materially occurred nor is likely to do so – is purely speculative.[17] Nor is the Commission's proposed differential rate narrowly tailored. Excluding direct sales programmers from the new, lower leased access rates ignores the fact that the class of direct sales programmers includes a diverse range of national and regional programmers, as well as smaller or specialized programmers and new entrants, any number of whom could not afford a differential rate.[18]

In this connection, Verizon contends that the Commission's proposed rates should not be extended to direct shopping programmers because they "already receive widespread

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[16] Shop NBC Comments at 5-6 (quoting *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811-12 (2000)). The fact that the Commission's proposal does not impose a complete ban on direct sales programming is irrelevant, because where "regulations . . . suppress, disadvantage, or impose *differential burdens* upon speech because of its content," a court must still "apply the most exacting scrutiny." *Id.* at 7 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)).

[17] *See, e.g., Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994) (noting that, in imposing restrictions on commercial speech, "'mere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree'") (citations omitted); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985) (noting that a State's "unsupported assertions" were insufficient to justify a commercial speech prohibition because "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force").

[18] *See, e.g.*, HSN Comments at 19 (noting that the Commission's proposal is both over- and under-inclusive); Shop NBC Comments at 11-13 (same).

coverage today under commercially negotiated agreements."[19] But as we demonstrated in our opening comments, the direct sales programming market is not monolithic. To the contrary, the market includes national, regional, full- and part-time services offering a wide and diverse range of programming, for many of which leased access is their only avenue to obtaining carriage.[20] Indeed, the record indicates that both large and small independent direct sales programmers struggle to secure carriage.[21]

Under the First Amendment the fact that some market participants currently are carried on cable systems clearly does not justify the exclusion of an entire class of programmers from the lower leased access rates available to all other programmers – indeed, it is irrelevant.[22]

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[19] Comments of Verizon, In the Matter of Leased Commercial Access, MB Docket 07-42, at 1 (March 31, 2008) ("Verizon Comments"). *See also* Combonate Comments at 2-3 (contending that direct sales programming is "readily available" on home shopping networks and is "a staple" on many broadcast stations and other cable channels during off peak hours).

[20] Although the number of full-time national direct sales programmers remains small, *see* note 2 *supra* and accompanying text, direct sales programming encompasses a broad range of part-time national and regional direct sales formats. *See* HSN Comments at 8 (leased access carriage is often the only way that less-established yet diverse regional and niche programmers can reach potential viewers). *See also* Shop NBC Comments at 22 (describing the smaller, specialized direct sales program services that have emerged over the past 20 years).

[21] Shop NBC Comments at 22-23, 25 (explaining that the current leased access rates – which would apply to all direct sales programmers under the Commission's proposal – are unaffordable to many direct sales programmers, and describing the difficulties some direct sales programmers already face in negotiating affordable or practical carriage arrangements on cable systems).

[22] *See* HSN Comments at 19 (the Commission's proposal is both over-inclusive and under-inclusive); Shop NBC Comments at 11-13 (same). Indeed, NCTA's statement that direct sales programming is "ubiquitously available" ignores the fact that both large programmers like Shop NBC and smaller and emerging direct sales programmers are not fully distributed on cable systems across the country.

The theoretical availability of alternative outlets for some direct sales programmers does not justify a content-based restriction on constitutionally protected speech.[23]

In addition to imposing a forbidden content-based restriction on speech, the Commission's proposal clearly discriminates against commercial speech, which enjoys significant protection under the First Amendment.[24] The Commission cannot satisfy the U.S. Supreme Court's four-part test for whether restrictions on commercial speech are permissible[25] because it has failed to demonstrate an important government interest in preventing purely theoretical migration, and the restriction is more extensive than necessary because it applies to all direct sales programmers regardless of their ability to afford carriage or offer diverse programming options.

## III. Direct Sales Programmers Serve the Public Interest.

The contention that a differential leased access rate is justified on a public interest basis also is unwarranted.[26] The record in this and previous Commission proceedings is replete with evidence that direct sales programmers serve the public interest. The Commission agreed with the "overwhelming majority of comments" in a pending proceeding that direct sales programming serves the public interest by, *inter alia*, providing service to people without the time or ability to purchase goods outside the home, fulfilling public interest programming

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[23] *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, n. 15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means.").

[24] *See, e.g., Trudeau v. New York State Consumer Protection Bd.*, 2006 WL 1229018, *18 (N.D.N.Y. 2006) (noting that, in the proceeding below, the judge "did not decide whether the infomercial [at issue] was core or hybrid speech as there was no dispute that it was commercial speech").

[25] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (setting out the four-part test).

[26] *See, e.g.*, Combonate Comments at 2.

obligations, and helping small or historically underperforming television stations attain financial viability.[27] Indeed, the value of such programming is evidenced by the significant number of viewers who depend on it.[28] To limit the ability of direct sales programmers to utilize leased access in favor of other programmers would disrupt the television marketplace and the expectations of countless viewers. MAP's assertion to the contrary is based on *a nearly half-century old* Commission report,[29] since which the market for and types of direct sales programs have expanded along with the nearly infinite expansion of the larger television marketplace. Today a broad and diverse array of direct sales programmers serve local interests, minority communities and other niche markets. The suggestion that disparate treatment of an entire class of programmers can be justified on the basis of a diversity study nearly as old as the television industry itself is, simply, nonsense.

## CONCLUSION

That some direct sales programmers make use of negotiated carriage options on particular cable systems is a wholly insufficient basis to discriminate in the leased access rates

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[27] *Report and Order*, In the Matter of Implementation of Section 4(c) of the Cable Television Consumer Protection and Competition Act of 1992, Home Shopping Station Issues, 8 FCC Rcd 5321, ¶¶ 3, 24, 28-36 (rel. July 19, 1993) (*recon. pending*). *See also* Reply Comments of Home Shopping Network, Inc., In Response to Public Notice DA 07-2005, MB Docket No. 93-8, at 8-9 (Aug. 2, 2007) (noting that the public interest continues to be served in these areas) ("HSN 1993 Reply Comments").

[28] HSN 1993 Reply Comments at 8 (citing the Community Broadcasters Association for the proposition that "if home shopping programming were of no interest to the public, no one would watch it, and stations would stop carrying it. Since stations are compensated on the basis of sales made, it is clear that the public is watching and finds [direct sales programming] desirable"). *See also* Shop NBC Comments at 20-21 and Exhibit B (benefits identified by viewers include price competition to brick-and-mortar stores and Internet shopping websites, detailed product information not found elsewhere, and a valuable source of entertainment).

[29] *See* MAP Comments at 2 (citing *1960 En Banc Programming Statement*, 44 F.C.C. 2301, 2314 (1960)).

available to direct sales programmers, and any such discrimination also is prohibited by the First Amendment. There is no evidence that material migration of direct sales programmers to leased access channels has occurred, or will occur in the future, to the detriment of cable operators. Meanwhile, the record demonstrates that direct sales programmers serve the public interest.

Accordingly, for all the reasons stated herein and in our Comments, the Commission should extend the modified leased access rate methodology to all programmers.

Respectfully Submitted,

**HOME SHOPPING NETWORK, INC.**

By: 

Mace J. Rosenstein
Robert A. Long, Jr.
Brandon D. Almond*

COVINGTON & BURLING LLP
1201 Pennsylvania Avenue NW
Washington, D.C. 20004-2401
202-662-6000

Its Attorneys

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*Admitted to the Virginia Bar. Not yet admitted to the District of Columbia Bar. Work supervised by principals of the firm pending admission.